

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

LARRY DONNELL DUNLAP,  
*Petitioner.*

No. 2 CA-CR 2020-0112-PR  
Filed July 6, 2020

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).*

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Petition for Review from the Superior Court in Pima County  
No. CR052543001  
The Honorable James E. Marner, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Larry Donnell Dunlap, Florence  
*In Propria Persona*

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Judge Brearcliffe and Judge Eckerstrom concurred.

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V Á S Q U E Z, Chief Judge:

¶1 Petitioner Larry Dunlap seeks review of the trial court’s ruling denying his emergency motion for modification of his sentence and request for early release due to COVID-19, which we treat as a petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the court’s ruling absent an abuse of discretion. *See State v. Martinez*, 226 Ariz. 464, ¶ 6 (App. 2011). Dunlap has not met his burden of establishing such abuse here.

¶2 Based on acts committed in 1995, Dunlap was convicted after a jury trial of one count of sexual abuse and five counts of child molestation. He had two direct appeals, resulting in a resentencing, *State v. Dunlap*, No. 2 CA-CR 96-0643 (Ariz. App. Apr. 21, 1998) (mem. decision), and a modification of his sentence upon resentencing, *State v. Dunlap*, No. 2 CA-CR 99-0084 (Ariz. App. Mar. 30, 2000) (mem. decision). The trial court imposed a combination of concurrent and consecutive prison sentences totaling 69.5 years. Dunlap has sought post-conviction relief on numerous occasions, but the trial court has denied relief, as has this court on review. *State v. Dunlap*, No. 2 CA-CR 2019-0271-PR (Ariz. App. May 11, 2020) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2016-0209-PR (Ariz. App. Aug. 17, 2016) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2013-0215-PR (Ariz. App. Oct. 7, 2013) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2011-0196-PR (Ariz. App. Oct. 19, 2011) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2004-0276-PR (Ariz. App. Feb. 11, 2005) (mem. decision); *State v. Dunlap*, No. 2 CA-CR 2002-0215-PR (Ariz. App. Sept. 11, 2003) (mem. decision).

¶3 While his most recent petition for review was pending before this court, Dunlap filed an “Emergency Motion for the Modification of Defendant’s Sentence” in the trial court, requesting an “order . . . for defendant to be immediately release[d] from prison due to the COVID-19 pandemic virus.” He argued that several inmates in his prison unit had tested positive for COVID-19, that he could not safely distance himself from others, and that he had serious underlying medical conditions, putting his

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“life in danger.” He also pointed out that his latest petition for review, which raised a claim of actual innocence, was pending. The trial court summarily denied the emergency motion, noting that “the requested relief is neither warranted nor available.” Dunlap thereafter filed a motion to supplement his emergency motion, providing the names of witnesses he sought to subpoena. The court granted the motion to supplement, but, after considering the supplement, the court concluded it provided “no basis to change [the] previous ruling” and reaffirmed the denial of Dunlap’s emergency motion. This expedited petition for review followed.

¶4 On review, Dunlap argues the trial court erred in ruling on his emergency motion without first obtaining a response from the state. Dunlap also asserts that his due process rights were violated because he was not allowed “to present his witnesses and other supporting evidence” at an evidentiary hearing. He further suggests that the court’s ruling was “retaliat[ion]” by the judge because Dunlap had filed “a complaint against him for [racial] discrimination.”

¶5 The trial court was required to consider Dunlap’s emergency motion for modification of his sentence under Rule 32, as Dunlap seems to recognize on review. *See* Ariz. R. Crim. P. 32.3(b) (court must treat any request for relief challenging sentence following trial as petition for post-conviction relief). Ordinarily, a Rule 32 proceeding is commenced by timely filing a notice of post-conviction relief. Ariz. R. Crim. P. 32.4. Under Rule 32.2(b), a successive or untimely notice of post-conviction relief is subject to summary dismissal under certain circumstances. We have explained that this rule serves a “gate-keeping function” by directing courts “to dismiss facially non-meritorious notices” of post-conviction relief. *State v. Harden*, 228 Ariz. 131, ¶ 11 (App. 2011). Rule 32.11(a) similarly provides that a court must summarily dismiss a petition for post-conviction relief if, “after identifying all precluded and untimely claims,” it determines that “no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule.” A defendant is entitled to an evidentiary hearing only if “he has alleged facts which, if true, would *probably* have changed the verdict or sentence.” *State v. Amaral*, 239 Ariz. 217, ¶ 11 (2016); *see also* Ariz. R. Crim. P. 32.13(a).

¶6 Here, the trial court was able to determine, based on Dunlap’s emergency motion alone, that he was not entitled to the requested relief in a Rule 32 proceeding. The court correctly concluded that Dunlap’s claim based on COVID-19 is not cognizable under Rule 32.1. *See State v. Mata*, 185 Ariz. 319, 332 (1996) (“Rule 32.1(a)-(g) list the types of claims over which a

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court has jurisdiction in post-conviction proceedings.”). Notably, neither below nor on review has Dunlap indicated upon which Rule 32.1 ground for relief his claim is based. We therefore find no abuse of discretion in the court’s dismissal of Dunlap’s claim at this stage of the proceedings, without ordering a response from the state or holding an evidentiary hearing. *See Martinez*, 226 Ariz. 464, ¶ 6.

¶7           Accordingly, we grant review, but we deny relief.